PERWIRA HABIB BANK (M) BHD.

v.

YAP YENG SENG

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C23-1102-86]
15 FEBRUARY 1989

CIVIL PROCEDURE: *Application for summary judgment under O. 14 - Defendant and his Counsel absent - Judgment entered - Application to set aside the judgment - Order 14 r. 11 - Principles same as those under O. 13 r. 9 - Reason for non-attendance - Whether there was an affidavit of merits.*

The plaintiff applied for summary judgment under O. 14 of the Rules of the High Court 1980 against the defendant. On the hearing date, the Counsel for the plaintiff was present but Counsel for the defendant was absent. The Senior Assistant Registrar entered judgment for the plaintiff in the absence of the defendant and his Counsel.

The defendant filed an application to set aside the judgment. On 8 September 1988, the Senior Assistant Registrar set aside the judgment under O. 92 r. 4. The plaintiff appealed.

Held:

[1] An application to set aside a judgment entered in the absence of the defendant must be made under O. 14 r. 11 of the Rules of the High Court 1980. The principles to be applied are the same as those under O. 13 r. 9. In addition, the Court has to be fully satisfied as to the reason for the non-attendance.

[2] In this case, the solicitors for the defendant knew of the new hearing date four days before the hearing and it was said to be sufficient notice.

[3] Merely saying that the date given for hearing was not convenient in that Counsel was engaged in another High Court without stating the case number was said to be an unsatisfactory reason.

[4] Where the judgment entered is regular, there must be an affidavit of merits in order for the defendant to have the judgment set aside. In this case, in the absence of any affidavit showing that the defendant had a defence on the merits, the defendant was not entitled to have the judgment set aside.

[Appeal allowed with costs.]

Cases referred to:
Farden & Anor. v. Ritcher [1889] 23 QB 124
Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Rakyat [1979] 1 MLJ 23

Legislation referred to:
Rules of the High Court 1980, O. 13 r. 9, O. 14, O. 14 r. 11, O. 92 r. 4

Other source referred to:
Supreme Court Practice, 1988, Vol. 1 p. 163

For the plaintiff - S.M. Yoong; M/s. Shook Lin & Bok
For the defendant - Hira Singh; M/s. Asbir, Hira Singh & Co.

JUDGMENT

Zakaria M. Yatim J:

This was an appeal by the plaintiff against the decision of the Senior Assistant Registrar given on 8 September 1988 allowing the defendant's application to set aside judgment entered on 4 April 1988, in the absence of the defendant.

The plaintiff filed their writ of summons and statement of claim on 25 April 1986. The writ of summons was served on the defendant by way of substituted service. The defendant through his solicitors, Messrs. Ng Ek Teong and Partners entered his appearance on 16 January 1987. An amended statement of claim was filed on 17 March 1987. The plaintiff's claim against the defendant was for a sum of RM2,743,664.18 being the amount due to the plaintiff as at 28 February 1986 with interest thereon at the rate of 3.75% per annum above the bank's base lending rate with monthly rests on the defendant's overdraft account with the plaintiff.

On 6 February 1987 the plaintiff filed an application for summary judgment against the defendant in the sum of RM2,743,644.18 with interest at the rate of 3.75% above the plaintiff's base lending rate with monthly rests from 1 March 1986 to date of full payment and costs. The application was fixed for hearing on 6 August 1987. On the hearing date on 6 August Counsel for both parties appeared before the Senior Assistant Registrar. On that date both parties agreed that the matter be adjourned to a new date. The Senior Assistant Registrar adjourned the case to a date to be fixed. On 5 October 1987, the Senior Assistant Registrar wrote to the solicitors of both parties, Messrs. Shook Lin and Bok and Messrs. Ng Ek Teong and Partners informing them that the new date of hearing was 22 October 1987. On that date Counsel for both parties appeared before the Senior Assistant Registrar and both parties agreed to adjourn the matter to 30 November 1987.

On 30 November 1987 the matter was again heard before the Senior Assistant Registrar. On this date Miss S.M. Yoong appeared for the plaintiff and Mr. Hira Singh appeared for the defendant. I produce below the record of the proceedings before the Senior Assistant Registrar on that date:

> Miss S.M. Yoong for plaintiff.
> Mr. Hira Singh for defendant.
>
> There has been change of solicitor.
> There was a conflict of interest.
>
> Plaintiff/Counsel: agree.
>
> Mah: Plaintiff's solicitor will write to Court for a date when parties are ready. It will be appreciated if Registry could fix an early date when plaintiff's Counsel writes to Court. No order as to cost.
>
> Sgd/-

It will be noted that according to the record the solicitors for the plaintiff would write to the Court for a new date of hearing.

Pursuant to the order of the Senior Assistant Registrar on 30 November 1987 the solicitors for the plaintiff wrote a letter on 4 December 1987 to the Senior Assistant Registrar for a new date. The text of the letter is reproduced below:

> Penolong Kanan Pendaftar,
> Bahagian Perdagangan,
> Mahkamah Tinggi,
> Kuala Lumpur.

Tuan,

Per: K.L. High Court No. C23-1102-86. Perwira Habib Bank Malaysia Berhad vs. Yap Yeng Seng.

Dengan hormatnya kami merujuk kepada perkara tersebut di atas itu.

2. Pada 30 November 1987, pembicaraan saman-dalam-Kamar (untuk "summary judgment") bertarikh 6 Februari 1987 telah ditangguhkan oleh Penolong Pendaftar Kanan kepada suatu tarikh yang akan ditetapkan oleh Mahkamah.

3. Diharapkan tuan akan dapat menetapkan suatu tarikh baru untuk pembicaraan tersebut dan akan memaklumkannya kepada kami. Kami mengharap tarikh tersebut akan dietapkan pada satu tarikh yang awal tetapi selepas 15 January 1987. Sekian, terima kasih.

Yang benar,

c.c. Pelanggan.

On 29 December 1987, the solicitors for the plaintiff wrote a letter of reminder to the Senior Assistant Registrar. In response to the two letters, the Court Registry sent a letter dated 16 January 1988 addressed to Messrs. Shook Lin and Bok and Messrs. Ng Ek Teong and Partners informing them that the date of hearing of the application was 31 March 1988. This date was subsequently changed to 4 April 1988. It appears that the solicitors for the defendant were aware of this new date. Miss Yoong Sin Min, an advocate and solicitor in the firm of Messrs Shook Lin and Bok, in her affidavit affirmed on 28 April 1988 averred "that the defendant's solicitors were aware of the hearing date of 4 April 1988 as I had so notified Mr. Hira Singh of the same on 31 March 1988." This is confirmed by a letter written by Messrs. Asbir, Hira Singh and Co. on 31 March 1988 to the Senior Assistant Registrar with a carbon copy to Messrs. Shook Lin and Bok. The text of the letter is as follows:

Penolong Kanan Pendaftar,
Mahkamah Tinggi,
Ipoh. **Express**

Tuan Yang Arif,

Per: Mahkamah Tinggi Kuala Lumpur Guaman C23-1102-1986. Perwira Habib Bank (M) Berhad lwn. Yap Yeng Seng.

Kami merujuk kepada surat kami bertarikh 26 Mac 1988, satu salinan fotostat surat tersebut dilampirkan oleh rujukan Yang Arif.

Cik Yoong Sin Min daripada Tetuan Shook Lin & Bok telah menghubungi kami untuk memberitahu kami bahawa perkara ini yang pada mulanya ditetapkan untuk perbicaraan pada 31 Mac 1988 dan Mahkamah dalam usulnya sendiri telah menetapkan semula pada 4 April 1988. Malangnya, peguam-peguam kami semua akan berada di Mahakamah Tinggi Ipoh dan oleh itu tidak dapat menghadiri Mahkamah pada hari ini.

Kami akan berbesar hati sekiranya Yang Arif dapat menetapkan semula tarikh perbicaraan di bulan Jun ataupun July. Tarikh-tarikh kelapangan kami adalah seperti berikut:

June 1988 - 8hb. dan 28hb.

Julai 1988 - 6hb., 7hb., 12hb., 14hb., 19hb. dan 21hb.

Kami berasa dukacita ke atas sebarang kesusahan yang terlibat. Jika kami boleh kata, kekeliruan (confusion) ini timbul adalah akibat dari kesalahan penghantaraan kepada Tetuan Ng Ek Teong dan Partners dan bukannya kami.

Yang benar,

Sgd/-

s.k. 1) Tetuan Shook Lin & Bok. (Ruj Tuan: THY/14143-23/PHB/YYS).

2) Pelanggan.

On 4 April 1988 the matter was before the Senior Assistant Registrar for hearing. Counsel for the plaintiff was present but Counsel for the defence was absent. The Senior Assistant Registrar adjourned the matter at 10.15 a.m. At 11.45 a.m. the matter was brought before the Senior Assistant Registrar again. Counsel for the plaintiff was present but Counsel for the defence was absent. The Senior Assistant Registrar then entered judgment for the plaintiff by default.

On 19 April 1988, the solicitors for the defendant, Messrs. Asbir, Hira Singh & Co. filed an application by summons-in-chambers for an order that the judgment entered by default be set aside. The application was supported by the affidavit of Mr. Hira Singh affirmed on 13 April 1988 and filed on 19 April 1988. On 8 September 1988, the Senior Assistant Registrar, exercising his powers under O. 92 r. 4 of the Rules of the High Court, set aside the judgment with costs to the plaintiff in any event to be taxed.

At the hearing of the appeal before me, Mr. Hira Singh cited an unreported case, *East Coast Trading Sdn. Bhd. v. Wah Siang Shipping Co. Sdn. Bhd.* (Kuala Lumpur Civil Appeal No. 74 of 1982). In that case, the appellant and his Counsel were absent at the trial in the Magistrate's Court. The learned Magistrate entered judgment in default against the appellant. The appellant applied to have the default judgment set aside but it was rejected by the learned Magistrate. The appellant appealed to the High Court. The learned Judge relied on O. 35 r. 2(1) of the Rules of the High Court. The learned Judge blamed Counsel for the appellant for the default judgment but decided that under the rule relied upon by him, the appellant was entitled to have the judgment in default set aside. In the *East Coast Trading* case the learned Judge probably intended to refer to O. 28 r. 8(1) of the Subordinate Court Rules 1980 instead of O. 35 r. 2(1) of the Rules of the High Court since the hearing was in the Magistrate's Court. In any case O. 28 r. 8(1) is similar to O. 35 r. 2(1) and both rules refer to trial proceeding. In the *East Coast Trading* case the appellant was absent at the trial in the Magistrate's Court. That case therefore did not apply to the instant case where there was no trial yet.

In the instant case the plaintiff made an application for summary judgment and the defendant and his Counsel were absent on the date of hearing before the Senior Assistant Registrar. An application to set aside the judgment in the absence of the defendant must be made under O. 14 r. 11 of the Rules. See *Jaya Leasing Sdn. Bhd. v. Madai Shipping Sdn. Bhd. & Ors.* (Kuala Lumpur CS C4-23-2942-86). (Unreported).

The principles on which judgment in default may be set aside under O. 14 r. 11 are the same as those under O. 13 r. 9. See the *Supreme Court Practice*, 1988, Vol. 1, p. 163. The rule for setting aside judgment in default under O. 13 r. 19 is that "where the judgment was obtained regularly there must be an affidavit of merits meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence." *Evans v. Bartlam.* Apart from this rule, the Court would wish to be fully satisfied as to the reason for the non-attendance at the hearing of the summons of the party against whom judgment was given under O. 14. The *Supreme Court Practice, supra*. p. 163.

The first question to consider was whether the judgment entered by the Senior Assistant Registrar in the absence of the defendant and his Counsel was a regular judgment. Mr. Hira Singh submitted that the judgment entered in his absence was an irregular judgment. In support of his submission he referred to his affidavit affirmed on 13 April 1988. In his affidavit he averred that notice of change of solicitors was filed in the Court Registry on 25 November 1987. According to him when the judgment in default was entered against his client on 4 April 1988 the notice of change of solicitors was not in the Court file. He also averred that on 16 January 1988 the Court Registry wrote a letter to Messrs. Shook Lin and Bok and Messrs. Ng Ek Tiong and Partners informing them that the new date of hearing was 31 March 1988. In another affidavit affirmed on 5 May 1988, Mr. Hira Singh averred:

> I have reason to believe that there is something very wrong with the filing of this particular case because the notice of change of solicitors which was filed on 25 November 1987 was not in the file even on 28 April 1988.

It does happen sometimes in the Court Registry that documents filed in the registry were not in the file. This is probably due to the large number of documents filed daily in the Court Registry and there were not enough staff to put those documents in the relevant files immediately.

In the instant case it was wrong for the Court Registry to send the letter dated 16 January 1988 to Messrs. Ng Ek Teong & Partners. If the notice of change of solicitors was not in the file, the endorsement in the file on 30 November 1987 clearly showed that there had been a change of solicitors.

However, although the letter dated 16 January 1988 was sent to Messrs. Ng Ek Teong and Partners, the solicitors for the defendant know well in advance of the date hearing on 4 April 1988. In his affidavit affirmed on 13 April 1988, Mr. Hira Singh averred that Miss Yoong Sin Min of Messrs. Shook Lin and Bok informed his office that the matter had been re-scheduled for 4 April 1988 by the Senior Assistant Registrar as he was on leave. In their letter to the Senior Assistant Registrar dated 31 March 1988, the solicitors for the defendant reiterated that they were informed by Miss Yoong Sin Min that the date of hearing had been re-scheduled from 31 March 1988 to 4 April 1988. It is clear from the letter, which is reproduced above, that on 31 March 1988, when the letter was written, the solicitors for the defendant knew of the hearing date fixed on 4 April. In other words the solicitors for the defendant knew of the new hearing date four days before the date of the hearing.

As already stated, Miss Yoong Sin Min in her affidavit affirmed on 28 April 1988, confirmed that the defendant's solicitors were aware of the hearing date of 4 April 1988. Since they were solicitors on record and since Mr. Hira Singh had appeared before the Senior Assistant Registrar on 30 November 1987, I think four days were sufficient notice for them. Since sufficient notice was given to the solicitors for the defendant of the date of hearing on 4 April, in my opinion in the circumstances of this case the judgment in default was a regular judgment.

Before examining the defence on the merits, I propose to consider what were the reasons for the absence of Counsel for the defence on 4 April. In his affidavit affirmed on 13 April 1988, Mr. Hira Singh averred that after being informed by Miss Yoong Sin Min that the new hearing date was 4 April 1988, his firm wrote the above letter dated 31 March 1988, explaining to the Senior Assistant Registrar "our inability to appear before the learned Senior Assistant Registrar." It will be noted that in the said letter, they stated, "Malangnya, peguam-peguam kami semua akan berada di Mahkamah Tinggi, Ipon dan oleh itu tidak dapat menghadiri Mahkamah pada hari itu." In the same letter they asked for the case to be postponed to a

date in June or July and they suggested some dates during those two months. In his affidavit affirmed on 5 May 1988, Mr. Hira Singh said that he informed Miss Yoong Sin Min that 4 April 1988 was not convenient to him and the other lawyer in the firm because they were engaged in the Ipoh High Court in various other matters and when he suggested she should mention on his behalf to inform the Senior Assistant Registrar, Miss Yoong Sin Min refused. In both the letters dated 31 March 1988 and in Mr. Hira Singh's two affidavits, the solicitors for the defendant did not give particulars of a case or cases they had in Ipoh High Court on 4 April 1988. In the affidavit affirmed on 5 May 1988, Mr. Hira Singh stated that 4 April 1988 "was not convenient to me and other lawyers in the firm because we were engaged in the Ipoh High Court in various other matters ..." What were the "various other matters" was not explained. No mention was made of the name of the case or the case number in the High Court Ipoh in the affidavits and in the letter of 31 March. Having considered the letter dated 31 March 1988 and the affidavits, I was not satisfied with the reasons given for non attendance of Counsel for the defence at the hearing on 4 April.

The next point to consider was whether there was an affidavit of merits. The first affidavit filed by the defendant was affirmed on 19 October 1987. This affidavit did not mention any defence to the plaintiff's claim at all. Mr. Hira Singh in his submission conceded that this affidavit, "encl. 12 for stay but not merits." The second affidavit was affirmed by Mr. Hira Singh on 13 April 1988. This affidavit had been referred to earlier and was concerned only about the hearing date before the Senior Assistant Registrar. According to Mr. Hira Singh this affidavit dealt with the question of "irregularity." The third affidavit was affirmed by Mr. Hira Singh on 5 May 1988. This affidavit too did not disclose any defence at all. Miss S.M. Yoong, Counsel for the plaintiff had rightly submitted that the defence had not filed any affidavit of merits. In the absence of any affidavit showing that the defendant had a defence on the merits, the defendant was not entitled to have the judgment set aside. *Farden & Anor. v. Richter* [1889] 23 QB 124. In *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Raayat* [1979] 1 MLJ 23. Raja Azlan Shah, Ag. CJ (Malaya), as he then was, in delivering the judgment of the Federal Court said, "it is exiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits."

For the reasons stated above I allowed the appeal with costs.

Also found at [1989] 1 CLJ 1101